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Supreme Court of the United States

OCTOBER TERM—1962

No. [redacted] 772

OVE GUSTAVSSON CONTRACTING CO., INC.,

Petitioner,

against

FRANKLIN G. FLOETE, as Administrator of General Services Administration, MICHAEL BRENNAN, individually and as Contracting Officer of General Services Administration, and WILLIAM A. BOYD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, above named, prays this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the judgment of that Court affirming the dismissal of this action, and to review that Court's denial of the petition for a rehearing.

a) Decisions Below

The Court of Appeals affirmed the judgment entered in the office of the Clerk of the United States District Court for the Eastern District of New York, dismissing the complaint for failure to state a claim upon which relief may be granted. Also, the Court of Appeals affirmed the decision of the trial court denying plaintiff's cross motion to sever the second cause of action from the first and to remand such second cause of action for trial to the State court where this action had been commenced. The first

cause of action sought a judicial review of an administrative decision pursuant to Article 10 of the *Administrative Procedures Act*. The second cause of action alleged the common law tort of malicious interference with a contract, a contract plaintiff had with the United States Government. The first cause of action is stated against the defendants as officials of General Services Administration; the second is stated only against Brennan and Boyd, individually. The defendant, Floete, was the department head of General Services Administration; defendant, Brennan, is a division chief at New York for the General Services Administration and was the contracting officer under the contract, while the defendant, Boyd, was an assistant to Brennan. The decision of the Court of Appeals is published at 299 F. (2) 655 and that of the trial court at 187 F. Supp. 839.

b) Jurisdiction

i. The judgment of affirmance was entered in the office of the Clerk of the District Court on the 14th day of March, 1962.

ii. Petition for re-hearing or for re-hearing *en banc* was denied by order of the Court of Appeals on the 13th day of March, 1962. No extension of time for the filing of this petition was sought or granted.

iii. It is believed that the provisions of *Title 28* U.S.C.A., Section 1254, subdivision 1 confers upon this Honorable Court, jurisdiction to review the judgment in question by writ of certiorari.

c) It is Believed That the Questions for Review May Be Stated as Follows:

1. Do the Federal courts continue to have jurisdiction over tort actions stated against Government officers in

their individual capacities, after there has been a removal of the cause because of the existence of a separate cause of action, when the cause upon which the removal was granted has been dismissed on defendants' motion and no appeal has been taken from such dismissal?

2. If the jurisdiction of the Federal court over the tort action was not lost, then is the defense of absolute immunity available to Brennan and Boyd from suit for the personal tort alleged against them?

3. Assuming that jurisdiction exists, has the Court of Appeals power to treat a motion to dismiss as a motion for summary judgment when the trial court and the parties treated with the subject matter as a motion to dismiss only and if it has, did it not err in deciding that defendants acted within the scope of their authority when that was an issue of fact tendered by the petitioner.

d) The Following Constitutional Provisions, Treaties, Statutes, Ordinances or Regulations Are Believed to Be Involved in This Review:

Article III of the United States Constitution known as the Judicial Power, Sections 1 and 2 thereof, which, in their pertinent parts, read as follows:

> "Section 1. The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. • • •
>
> Section 2. The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all cases of admiralty and

maritime jurisdiction,—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a State and Citizens of another State;—between citizens of different States;—between citizens of the same State claiming lands under the grant of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Article 1, Section 8 of the *United States Constitution* reading, in its pertinent parts, as follows:

> "Section 8. The Congress shall have power • • • to constitute tribunals inferior to the Supreme Court."

The Fifth Amendment to the *United States Constitution* reading, in its pertinent parts, as follows:

> "Amendment 5. No person shall be • • • deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

28 U.S.C.A., Sections 1331 and 1332, defining the jurisdiction of the District courts read, in their pertinent parts, as follows:

> "Section 1331. The Federal Question, amount in controversy; costs.
>
> (a) The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of any interest and costs, and arises under the Constitution, laws, or treaties of the United States. • • •
>
> Section 1332. Diversity of Citizenship; amount in controversy; costs.
>
> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in contro-

versy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different states; • • •"

Title 28 U.S.C.A., Section 1346, embodying the consent of the United States of America to suits against it arising out of its contracts with the public, which, in its pertinent provisions, reads as follows:

"Section 1346. United States as Defendant.

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

• • • • •

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded • • • upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

28 U.S.C.A., Sections 1441(b)(c) and 1442(a)(1), the removal statute, read in their pertinent parts, as follows:

"Section 1441. Actions removable generally.

• • • •

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

"Section 1442. Federal Officers sued or prosecuted.

(a) A civil action or criminal prosecution commenced in a State court against any of the following

persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue."

28 U.S.C.A., Section 1447(c) the remand statute, reading in its pertinent parts, as follows:

"Section 1447. Procedure after removal generally.

• • • • •

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case and may order the payment of just costs."

e) Statement of the Case

This action was commenced in the Supreme Court, of the State of New York, County of Queens, by the personal service of the summons and complaint upon the defendants, Brennan and Boyd, on the 26th day of June, 1959. The defendant Floete was not served. The defendants, Brennan and Boyd, removed the action to the United States District Court, Eastern District of New York, upon the ground that they were entitled thereto by the provisions of Section 1442, subdivision (a)(1), because they had acted under "color of office." The complaint alleged two causes of actions. The first cause sought among other relief, a review, under section 10 of the *Administrative Procedure Act* (5 U.S.C.A. 1001, *et seq.*) of the decision of Brennan as contracting officer, under a contract the plaintiff had with the United States Government for the construction of

a hutment in the Government warehouse at Burlington, New Jersey, by which said Brennan purportedly terminated the contract for the plaintiff's fault.

This cause of action was dismissed by the court below and no appeal was taken from such dismissal by the petitioner and the matter is now out of the case.

The second cause of action is stated against Brennan and Boyd, individually, and seeks recovery under State law of damages for the common law tort of malicious interference with the contract, seeking exemplary as well as general damages. The complaint specifically alleges that the aforesaid termination of the contract was caused by the joint action of Brennan and Boyd to harm and injure petitioner by reporting to their superiors in Washington that the petitioner was in default when it was not and that the construction of the hutment was faulty in several respects, when it was not and thus falsely inducing their superiors in Washington to authorize the cancellation. The complaint states that defendants acted out of a personal motive, wilfully and maliciously, to injure and harm petitioner by causing the cancellation of the contract at a time when the petitioner would have used up its cash resources in the prosecution of the contract and by means of the cancellation, they would deprive petitioner of any progress payments and further, they would by reporting said unlawful cancellation of contract to petitioner's surety they hoped to disqualify petitioner from obtaining new government work and in general, to cause such losses to the petitioner's financial position and reputation as to drive it out of business.

The facts as they could be proven upon the trial of the second cause of action were that the contract was entered into on June 1, 1958 with completion date set for October 2, 1958; that in September, 1958, the completion date was extended without date by the "contracting officer" in writing. During performance of the work thereafter, Boyd threatened to "break" the petitioner financially by can-

celling the contract and reporting said cancellation to petitioner's surety. Implementing said threat, Boyd interfered with the performance of the contract by requiring deviations from the specifications of the contract and by requiring an unnecessary large force of workmen to prosecute the work and then by reporting arbitrarily, capriciously, and fraudulently, to his superior in Washington, untruthful statements of facts to the effect that petitioner was in default in completion and in that his execution of the work was faulty when it was not, and thereby induced his superior in Washington to give his consent to the termination of the contract, upon which consent, Brennan and Boyd, acted to and did issue the aforesaid letter of termination complained of above. Said letter of termination is dated January 12, 1959. It reads as follows:

> "In view of your failure to satisfactorily execute and complete the contract in the amount of $47,000 awarded to you on May 28, 1958 at Burlington, New Jersey, your right to proceed with the work is hereby terminated. The custodian of the building has been directed to forbid you and your representatives admission to the premises and to take possession of all tools, materials, machinery, etc., belonging to you at the site. You are advised that an inventory of the work in place and all materials on the site will be made, on Wednesday, January 14th, A. M. All excess costs incurred by reason of your default will be charged to you."

On the 6th day of February, 1959, the petitioner appealed from the decision of Brennan to the defendant, Floete, as head of the department and requested a hearing. Pending said appeal, petitioner demanded that it be permitted to proceed with the contract to retain the *status quo* for such is a provision of the contract, section 6 of which reads as follows:

> "Disputes. Except as otherwise provided in this contract, any dispute concerning a question of fact

arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the head of the department, and the decision of the head of the department or his duly authorized representatives for the hearings of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive: Provided, that, if no such appeal to head of the department is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision."

Brennan refused all offers of performance and proceeded to invite new bids for the work. The petitioner then brought its first action under this state of facts. This first action was brought in the United States District Court for the Southern District of New York, and named Floete and Brennan only, as defendants, and alleged only one cause of action, seeking an injunction against the new invitations to bid the job and seeking judicial review of Brennan's decision to terminate the contract as provided by Section 10 of the *Administrative Procedure Act*. This action was dismissed in the District Court by order of Judge Cashin who held (a) as to Floete, that he was an indispensable party and jurisdiction was not properly obtained over him, and, (b), as to Brennan, that there was a

lack of diversity of citizenship between Brennan and the petitioner, as plaintiff, both of whom were residents of New York State. The fact that the action sought to judicially review agency action was not touched upon by the court. See *176 F. Supp. 544.*

Upon appeal to the Court of Appeals, that court recognized that a federal question was involved, but affirmed the dismissal on the ground that:

(a) The action was in reality against the United States and since the amount in suit was more than $10,000 the Court of Claims rather than the District Courts had jurisdiction;

(b) That no jurisdiction in the District Courts could be inferred from the claim to a judicial review under the *Administrative Procedure Act* because that Act did not confer any additional jurisdiction upon the district courts but merely defined the procedures and manner of obtaining a judicial review of agency action; and that

(c) By reason of the fact that an appeal was pending with the General Services Administration, the administrative processes had not been completed and hence petitioner could not come into court. See *278 F. (2) 942.* Certiorari was denied by this court, *364 U. S. 894.*

Pending such appeal to the Court of Appeals, and taking the decision of the District Court, that there was no jurisdiction over Brennan because there was no diversity of citizenship, at face value, the petitioner brought this action in the Supreme Court, State of New York, County of Queens, where petitioner resided. In doing so, it decided not only to ask for a judicial review of the Brennan action, but also it decided to add the second cause of action, a personal tort count against said defendant and his assistant, to obtain complete redress in the local courts. The case was promptly removed upon the petition of Brennan and Boyd under the specific provisions of Section 1442(a)(1)

because of the first cause of action. A motion to remand was denied by the District Court on September 10, 1959. See *176 F. Supp. 841.*

Thereafter, but before answering, the defendants, Brennan and Boyd, moved to dismiss the complaint under Rule 12(b) 1, 3, 6, and 7. However, only subdivision 6 was pressed and considered by the court below, namely "failure to state a claim upon which relief could be granted." The petitioner cross-moved for an order to sever the second cause of action from the first, and to remove the second cause of action to the state court where the action was commenced, on the ground that the second cause of action stated a common law tort against Brennan and Boyd individually, and consequently, there was no jurisdiction in the district court to hear such cause. These motions came on to be heard at a time subsequent to the affirmance by the Court of Appeals but pending application for the writ of certiorari thereon to this Court. The motions were heard by the same district court judge who had previously refused to remand. The district court denied the motion to sever and granted the motion to dismiss both causes of action on the ground that they failed to state a claim upon which relief could be granted. See *187 F. Supp. 889.*

The denial of the motion to remand was based solely upon the authority of 28 U.S.C.A., Section 1442(a)(1). The first cause of action was dismissed because the district court said that the Court of Appeals' decision was decisive of it against the petitioner. With respect to the pending application for a writ of certiorari, the district court said that even if the writ were to be granted and this court were to reverse the Court of Appeals, petitioner would still have its cause of action in the Southern District Court intact.

The dismissal of the second cause of action was placed, mainly, upon the authority of *Gregoire* v. *Biddle* (2nd Cir. 1949), 177 F. (2) 579, granting absolute immunity to certain Federal officers but without explaining why that rule

applied to this case. After this decision, the United States Supreme Court denied certiorari in the first suit. Upon appeal to the Court of Appeals from the judgment of dismissal and the refusal to remand in this case, petitioner abandoned the first cause of action and prosecuted its appeal only from the dismissal of the second cause of action and the refusal to remand. The Court of Appeals affirmed (299 F. (2) 655). It, too, failed to note the limitations of Section 1442(a)(1) that civil action may be removed "by any officer * * * for any act under color of such office" could not be applied to an action alleging a personal tort against the officer.

It upheld the dismissal of the second cause of action, saying that absolute immunity applied to tort suits against government employees because they "are not personally liable for torts committed while performing their duties", even though the act, as here, was not justified by the facts, but was motivated by personal desires of the officers to use their official positions to harm and injure petitioner. However, the decision in the Court of Appeals was not wholly unanimous. Judge Medins who wrote the majority opinion was joined in that opinion by Judge Lumbard. The third member of the court, Judge Waterman, concurred in the result only; he refused to hold as the majority had done, that immunity applied to all employees, saying that the doctrine of absolute immunity "should not be extended to cloak with immunity all government employees." Wherefore, this petition for certiorari was brought.

f) Jurisdiction in the Court of First Instance

The removal to the District Court was ordered because of a claim of the defendants, Brennan and Boyd, that what they did, they did under "color of office". They cited Section 1442(a)(1) of Title 28 U.S.C.A. as authority for their claim of removal and claimed that the presence of the first cause of action in the complaint entitled them to

removal. This Section was derived from a prior statute affording removal to revenue officers and to officers engaged in the apprehension and punishment of criminals.

Tennessee v. *Davis* (1879), 100 U. S. 257, 25 L. ed. 648;
Davis v. *South Carolina* (1882), 2 S. Ct. 636, 107 U. S. 597, 27 L. ed. 574;
Hart v. *Wechsler, The Federal Courts and The Federal System*, 1147, 1148.

While the removal of this cause could have been effected under Section 1441 of Title 28 U.S.C.A. subdivision (b) because the first cause of action does state a claim or right arising under the laws of the United States, the defendants did not remove under that Section. They carefully avoided this ground because the Southern District Court had already held that there was no jurisdiction in the District Court over such a cause of action. Accordingly, the defendants sought a different ground and asserted the ground that they could remove because they were acting under "color of office" and nothing more. They specifically mentioned Section 1442(a)(1) but avoided the limitations upon removal stated in that Section. They claim for that Section, and both District Court and the Court of Appeals agreed with them that a suit brought against any official of the United States Government could be transferred to the District Court so long as they claimed that they acted under "color of office", irrespective of whether the claim is pressed against them personally and individually rather than in their official capacity, and irrespective of whether the cause of action was one arising under State law and was cognizable in the State courts, and irrespective of whether such government official is one of those officials specifically enumerated by the statute to be protected by the transference of the trial to a federal court. Hence, the petitioner believes that error was made in failing to recognize the lack of jurisdiction of the district court over this second cause of action.

POINT I

The lack of jurisdiction in the federal courts requires the grant of this petition so that upon a review of the judgment, this Court may declare that the refusal to remand was error.

The federal courts are courts of limited jurisdiction, limited by the statutes setting forth their jurisdiction. Federal courts must dismiss or remand causes which exceed that jurisdiction.

Lee Foods Div., Cons. Gro. Corp. v. *Bucy*, 105 F. Supp. 402, 404;
Solanics v. *Republic Steel Company*, 34 F. Supp. 951, 955.

The complaint should be examined to determine jurisdiction. In this case what plaintiff seeks, in the second cause of action is redress for the common law tort of malicious interference with contract rights. The claim is asserted against Brennan and Boyd, personally. Such rights of the plaintiff arise under the laws of the State of New York, where the wrong occurred.

Lamb v. *S. Cheney & Son*, 227 N. Y. 418;
Campbell v. *Gates*, 236 N. Y. 457;
Hornstein v. *Podwitz*, 254 N. Y. 433;
Reimer v. *North American Newspaper Alliance*, 259 N. Y. 250, 253, 254;
Israel v. *Wood Dolson Co.*, 1 N. Y. (a) 116; 151 N.Y.S. (2) 1, 5;
Vassardakis v. *Parish et al.*, 36 F. Supp. 1002, 1005;
52 American Juris. Section 42 page 387;
Restatement of the Law of Torts, Vol. IV, pp. 85, 87, 88.

The elements of this tort are:

1. The existence of a valid contract;
2. the defendants' knowledge of the contract;
3. the defendants' intentional procuring of the breach of the contract;
4. damages.

Israel v. *Wood Dolson Company*, *supra*, page 1005.

It was stated in *Hornstein* v. *Podwitz*, *supra*, at page 448:

> "The action is predicated on the intentional interference without justification with contractual rights, with knowledge thereof. Said interference constitutes a legal wrong, and if damages result therefrom, a valid cause of action exists therefore."

The word "maliciously" in this context should be broadly construed. It is defined in Bouvier's Law Dictionary (Rawle, 3rd Ed.) as meaning "with deliberate intent to injure." The act is malicious when the thing done is with the knowledge of plaintiff's rights and with the intent to interfere therewith. In a legal sense, it means a wrongful act, done intentionally; not actual malice or ill-will, but the intentional doing of a wrongful act without legal justification. Cf. *Lamb* v. *Cheney & Sons*, *supra*, page 442.

Normally defendants cannot claim immunity by alleging their action was for and in behalf of their principal. In *Vassardakis* v. *Parrish*, *supra*, at page 1005, Goddard, J. said:

> "It would be unconscionable to allow such a defendant to cloak himself with immunity merely because he was an employee or officer of the Corporation."

In that case, the defendant, Myer, was defending upon the theory that the acts complained of were committed as

an officer of the defendant's corporation. Hence, it was argued, on defendant's motion for summary judgment, that said plaintiff still had his cause of action against the corporation, that he had not lost anything, and he had no cause of action against the individual defendant. The Court denied said defendant's motion for summary judgment.

Similarly in *Hornstein* v. *Podwitz*, the Court of Appeals of the State of New York said at page 449:

> "The fact that the plaintiff also has a cause of action against his principal for breach of contract does not prevent his having a cause of action in tort against them. * * * all of the parties who induced the breach of the contract are jointly and severally liable. * * *"

Brennan and Boyd are alleged to be joint tort feasors. The action is not against them as goverment officers. The gist of the action is their personal desire to harm and injure the petitioner. Such an act is their personal act. It is not alleged that they acted in furtherance of their duties and that they acted unfairly or unjustly. The reverse is alleged, viz., that they pursed their own objective of causing harm and injury to petitioner. This allegation then alieges personal torts against said defendants.

> *Bell v. Hood* (9th Cir. 1945), 150 F. (2) 96; cert. granted 326 U. S. 706, rev. 327 U. S. 678;
> Cf. decision after trial *Bell* v. *Hood*, 71 F. Supp. 813;
> Cf. *Hatahley* v. *U. S.* (1956), 351 U. S. 173.

The case of *Bell* v. *Hood*, *supra*, is peculiarly applicable because the complainant there found a way of using the Federal Courts to sue Federal officials in their individual capacities for a tort alleged to be that of invading complainant's privileges under the Fourth and Fifth Amend-

ments of the United States Constitution. Said complainants also had the right to bring suit for damages for the common law torts of false arrest and false imprisonment. In the allegations pleaded, this court held that the suit was against the defendants in their individual capacities and not as government officers. The court said that the complaint was that a tort had been committed against plaintiffs, although the act was one which the defendants would have a right to perform as government officers if there was probable cause for the exercise of their duties. The cases recognize the right of the plaintiff to sue for damages under the common law tort counts in the state courts against the said officials personally. That is all there is in this case—a common law tort arising under state law, brought in a state court, against two individuals who abused their positions as government officials, to the injury and harm of the petitioner.

The fact that the case might have been removable by reason of the existence of the first cause of action does not mean that the case could have been continued in the federal court. The causes of action were separate and independent. Where there has been a removal and the cause of action which brought about the removal is itself removed from the case, leaving only a state-created right to be enforced, the remainder of the case should be remanded to the state court for trial.

Texas Transport v. *Seeligson*, 122 U. S. 519;
Sklarsky v. *Great A & P Tea Co.* (S.D.N.Y. 1932), 47 F. (2) 662;
Solanics v. *Republic Steel Corp.* (N. D. Ohio, 1940), 34 F. Supp. 951;
Torrance v. *Sheed*, 144 U. S. 527;
Highway Construction Co. v. *McClellan*, 15 F. (2) 187 cert. den. 273 U. S. 705;
Chicago B & O R.R. Co. v. *Willard*, 220 U. S. 413, 418;

Alabama Great Southern R.R. Co. v. *Thompson*, 200 U. S. 206;
28 U.S.C.A. 1447 (C).

The facts in the *Sklarsky* case parallel the facts in the case at bar. Two causes of action were originally stated in the complaint in that case, although not separately stated. One was in contract and the other in tort for malicious inducement of the breach of contract. The action had been removed by reason of the fact that one of the two causes was alleged against the defendant, The Great Atlantic & Pacific Tea Co., as to whom diversity existed. The separate cause of action against the defendant, A & P, was dismissed leaving only the cause of action against the other defendant as to whom no diversity existed. Judge Woolsey directed a remand saying that because of the dismissal, the district court no longer had jurisdiction of the action.

It has been held by this court that the plaintiff is the master of what its suit for damages shall be and if it moves under state rights then the question of jurisdiction is controlled by what the plaintiff has alleged.

Pullman Co. v. *Jenkins*, 305 U. S. 534, 438;
American Well Works v. *Lane*, 241 U. S. 257;
American Fire & Cas. Co. v. *Finn* (1951), 341 U. S.

Also it was early established that the diversity of citizenship which would require the removal of an action to the Federal Court shall be where each party defendant is a resident of a different state from each party plaintiff.

Strawbridge v. *Curtiss* (U. S. 1806), 3 Cranch. 267, 2 L. Ed. 435;
Dollar SS Lines v. *Merz* (9 Cir. 1934), 68 F. (2) 596;

Hart & Wechsler, The Federal Courts and The Federal System, page 901 n. 1.

In this case the defendant Brennan admits that he is a resident of the State of New York, the same as the plaintiff. Hence, there is no way in which the jurisdiction of the district court could be spelled out within the congressional grant of jurisdictional powers to that court. Oddly there are no cases decided by this court interpreting "under color of office" rule as applicable to a cause of action alleged against the officers personally.

POINT II

a) The issue of whether the defendants were acting within or without the scope of their authority.

If the petitioner is wrong on the question of jurisdiction, then it is submitted that the defense of absolute immunity which was established by the Court of Appeals in this case was decided in a manner in conflict with the decision of another Court of Appeals and in conflict with the cases and principles established in the decisional law of this court and presents an important federal question which has not been but should be decided by this court.

The defense of absolute immunity does not create "jurisdiction" nor does it require that the District Court shall exercise exclusive jurisdiction over this case. It was long ago held in *Slocum* v. *Mayberry*, 2 Wheat. 1, by Chief Justice Marshall that State Courts are not forbidden by Congress from trying questions of an officer's authority when they are charged with personal tort. See also *Buck* v. *Colbath*, 3 Wall. 234; *Teal* v. *Felton*, 12 How. 284, where removal was not allowed because the defendant's tortious conduct was unsupported by the claimed authority; and *Scranton* v. *Wheeler*, 179 U. S. 141. Accordingly, the defense of absolute immunity may be raised in the State Court.

It is submitted that the decision of the Court of Appeals in this case is in conflict with the decision of the Court of Appeals of the 8th Circuit in *Gibson* v. *Reynolds*, 172 F. (2) 95, cert. den. 337 U. S. 925. In the latter case, said Court of Appeals considering whether an agent's actions were within or without the scope of authority conferred upon him stated at pages 98-99:

> "The law does not contemplate the administration of official duty for the purpose of the attainment of the officer's personal ends or to satisfy his selfish personal motives of spite, ill-will, revenge, greed or avarice. When an officer performs an act under color of his office with such motives as the actuating cause or clearly without any right to act, he is not acting within the scope of his authority and the cloak of his office furnishes him no protection from civil actions for an injury perpetrated. Hence, the question here is, as it is in all cases where this doctrine of immunity is advanced, were these officials acting within the scope of their authority in the performance of the duties of their respective offices? The answer to that question lies in the application of the rule to the facts appearing in the complaint."

In the case at bar, the complaint itself alleges that the defendants, Brennan & Boyd were pursuing a personal interest in willfully and intentionally inflicting harm and injury upon petitioner by impairing its financial standing and reputation by improperly reporting the petitioner to be in default of the contract when it was not, declaring that it had gone beyond the completion date and that the performance was faulty in several respects when that was not the fact at all. The true fact was that petitioner's completion date had been extended without date to some reasonable time after the delivery of the steel at the job site, which extended the date beyond February 1, 1959, whereas the actual termination occurred by notice dated

January 12, 1959. This desire to report the petitioner to be in default under the contract was in pursuance of the defendants' own desire to harm and injure the petitioner rather than in pursuit of their governmental duties in ascertaining and reporting the condition of the job to their superiors. The complaint alleges definitely the intent of the defendants was to persecute the petitioner rather than to do their duty. Accordingly, the complaint is brought clearly within the principles of *Gibson* v. *Reynolds, supra.*

Also, the same question of whether an agent acts within the scope of his authority when he acts wilfully to destroy another's property, was answered in favor of the petitioner's views by this court in *Hatahley* v. *U. S.*, 351 U. S. 173. In the *Hatahley* case, this court had to determine whether the agent was acting within his scope of authority when he was rounding up horses which he knew belonged to the petitioners, on the excuse that they were "abandoned" horses, which he later destroyed or sold off to others. It was admitted that the real purpose of the defendant was to drive the Indian owners away from the range. The defendants were federal officers who defended saying that in rounding up the horses they had acted under authority extended to them. This court stated that the federal officers had abused their positions for they knew the horses were not abandoned but belonged to petitioners. Therefore, their act exceeded their authority although it appeared to be in the line of their duties. The court held the act to be unlawful and tortious and allowed the petitioner to recover.

In the case at bar, the Court of Appeals relied upon *Gregoire* v. *Biddle*, 177 F. (2) 579, and concluded that the defendants were acting within the scope of their authority. Yet there was no proof of the extent of the defendants' authority before the court. Defendants offered an affidavit stating the conclusion that they acted within their

official duties and responsibilities. However, neither defendant denied the material allegations of the complaint that they had acted to injure and harm the petitioner. The Court of Appeals nevertheless disregarded the lack of facts. Instead, it inferred that the defendants were acting within the usual scope of their duties and relying upon the broad language of the late Judge Hand, which is quoted in the opinion below, defining the scope of immunity, decided that immunity applied. Judge Hand, however, did not discuss what acts of an officer were within or without the scope of his authority. He had found that immunity applied because the defendants were important decision making government officers who required to be protected in the performance of their government duties. After this, he expounded upon the extent of the immunity, saying that it applied to all their official acts. The question of whether the acts in the *Gregoire* case were personal or official was never in issue, although that complaint alleged that the officials had acted maliciously. However, the complaint was read against the facts of the case which were that Gregoire had had several departmental hearings and court decisions, all of which had gone against his contentions until a third judge in a fourth proceeding finally resolved it in his favor. Under such circumstances, it was highly unlikely that the charge of maliciousness could be proven.

> *Hart & Wechsler, the Federal Courts and the Federal System*, p. 1216.

Consequently, when he discussed the extent of the immunity, Judge Hand said that it is to be applied to all acts of the officer which if properly done would fall within the scope of his authority. This is a far cry, however, from the facts of this case.

On the narrow issue of whether these defendants were acting within or without the scope of their authority, the Court of Appeals below simply confused cause for effect.

Immunity applies because of the need to protect the government not because an act alleged to be that of the government was done, regardlless of whether need for immunity exists.

The fact remains that, on their merits, the fact allegations on a motion addressed to the pleadings where the complaint clearly alleged the usual common law tort of malicious interference with contract rights, all of which remained uncontradicted, should have been accepted as true and the Court of Appeals ought to have found that these defendants were not acting officially. As said decision is in conflict with the case of another Court of Appeals settling the question in favor of the petitioner, this court is respectfully requested to issue its writ of certiorari to the Court of Appeals.

b) The issue of the extent of absolute immunity.

The defendants' motion to dismiss was granted by the District Court without explanation. Never once did the District Court use the word immunity. The District Court merely quoted four cases in libel which held the government officer to be "privileged" and cited a passage from *Gregoire* v. *Biddle* without showing how, in its opinion, the quotation applied to the facts of the case at bar. The four cases in libel quoted by the District Court were *Barr* v. *Matteo*, 360 U. S. 564; 79 S. Ct. 1335 (1959); *Howard* v. *Lyons*, 360 U. S. 593; 79 S. Ct. 1331 (1959); *Ross* v. *Lieberman*, 187 F. Supp. 841 (E.D.N.Y. 1960); *Hartline* v. *Clary*, 141 F. Supp. 151 (E.D.S.C. 1956). These cases are not authority for the application of the rule of immunity. The chief differences between the case at bar and the *Gregoire* case are that the defendants in *Gregoire* were important judicial officers who were engaged in governmental functions and whose sole purpose in handling the Gregoire matter was to do their duty, although the result was not to Gregoire's liking. Whereas, in the case at bar, we have government employees who were engaged in the

supervision of a construction contract who used their positions unlawfully to cause the cancellation of a contract to gratify their own desire to harm and injure the plaintiff. In *Gregoire*, the purpose of immunity is clearly stated. It is to serve the government's interests. If the government did not have immunity, then the agent could not have it. In the case at bar, the Court of Appeals disregards this purpose. It even disregards the implications in the fact that the defendants' employment was in connection with a construction contract. It has been held that when the government contracts for construction work, that it enters the market place, and in such instances, the government subjects itself to the usual rules applicable to individuals in the market place.

Cooke v. *U. S.*, 91 U. S. 389;
Cf. *The Century Indemnity Co.* v. *U. S.*, 236 F. 2d 752, 756.

The establishment of a court of claims was the government's way of waiving its immunity in such matters. See *Hart & Wechsler, The Federal Courts and The Federal System*, pp. 742, 743. *A priori*, if the government does not have immunity, then its agents cannot have immunity.

Furthermore, there are many instances where this court has said that a federal officer may be personally sued.

Tracy v. *Swartwout*, 10 Pet. 80 (U. S. 1836);
Kendall v. *Stokes*, 3 How. 97, 98;
Little v. *Barreme* (1804), 2 Cranch. 170; 6 U. S. 170;
United States v. *Lee*, 106 U. S. 196;
Belknap v. *Schild*, 161 U. S. 10, 18;
Smith v. *Reeves*, 178 U. S. 436, 439;
Tindal v. *Wesley*, 167 U. S. 204;
Scranton v. *Wheeler*, 179 U. S. 141, 152;
Philadelphia Co. v. *Stimson*, 223 U. S. 605, 619, 620;
Sloan Shipyards Corp. v. *U. S. Fleet Corp.*, 258 U. S. 549;

State of Colorado v. *Toll*, 268 U. S. 228;
Goltra v. *Weeks*, 271 U. S. 536;
Ickes v. *Fox*, 300 U. S. 82;
Keifer & Keifer v. *Reconstruction Finance Corporation*, 306 U. S. 381, 388-389;
Yearsley v. *W. A. Ross Contracting Co.*, 309 U. S. 18;
Bradley v. *Roosevelt S.S. Co.*, 317 U. S. 555, 580;
Maricopa County v. *Valley Nat'l Bank*, 318 U. S. 357, 362;
American Stevedores v. *Porello*, 300 U. S. 353, 354;
Land v. *Dollar*, 300 U. S. 731;
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U. S. 579;
Bell v. *Hood*, *supra*.

Hart & Wechsler, in their treatise aforementioned, state at page 1161:

> "10) Congress may endow a government agency or instrumentality with governmental immunity from suit or execution. But 'the government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work'; and the immunity is not readily implied."

For a better collection of cases of where government officials have been sued, see the dissenting opinion of Mr. Justice Frankfurter in *Larsen* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682, starting at page 706.

Government officials then are suable either in equity or at law. They are required to respond for their torts, either in general damages or in equity, for an injunction. They are suable for trover. In fact, they are suable whenever they have invaded private rights by exceeding their authority or by acting in violation of the Constitution or as in this case by force of their own arbitrary will. The officials sued have been in high office, or were merely minis-

terial officials or even were corporate agents of the United States.

Yet, the decision of the Court of Appeals in this case grants absolute immunity to all government agents upon a mere claim of such agent of having acted within the scope of his duties. The sweep of the decision can best be described in the words of Judge Waterman who refused to join in the majority opinion. He said:

> "I question the wisdom of flatly holding that the law grants immunity from personal tort liability to all government employees performing official duties that can be represented by the actors to be duties involving the exercise of judgment and discretion. This I understand to be the rationale of the majority opinion.
>
> All jobs, even the most routine government ones, require the jobholder to exercise some degree of judgment and discretion on the job. A rational doctrine originally evolved to protect high-ranking policy-making administrative officers of our government should not be extended to cloak with immunity all government employees."

It can be safely said that this court has never gone as far in granting immunity to federal employees as did the Court of Appeals. Indeed, it could be said that the Court of Appeals has gone so far as to usurp the legislative function in granting immunity so broadly. On the other hand, this court stated in *American Stevedores* v. *Porello*, *supra*, that the United States should put aside its sovereign armor in cases where federal employees have personally caused injury and damage. Nor is the function of sovereign immunity well served when it is diluted to so great an injury to members of the public who must come into contact with government officialdom.

> "The deprivation of a right will not be condoned: the right will be protected. It is immaterial that they

> acted to enforce the law, when their aim was to deprive a citizen of a right."

Screws v. *United States*, 325 U. S. 91, 101-106.

In an article by Prof. Block, "Suits against Government Officers and the Sovereign Immunity Doctrine," 59 Harv. 2 Rev. 1060, it is suggested at page 1080 that the use of sovereign immunity be limited to its fundamental purpose "the prevention of undue interference with the operation of the government." Why then extend it as the Court of Appeals has done below.

Perhaps the question is unsettled. The dissenting opinion of Mr. Justice Frankfurter in *Larsen*, *supra*, tends to show this transitional nature of the problem.

Hart & Wechsler, in their treatise referred to above pose the question, after discussing the conflicting application of the rule of sovereign immunity, at page 1221:

> "On an issue so fundamental and so frequently recurring, are the country and the profession entitled to more light than the Court has thus far vouchsafed?"

Inasmuch as the Court of Appeals has taken a position, it is respectfully submitted that this Court, too, might examine the situation in the exercise of its constitutionally endowed supervisory control over such matters.

POINT III

To decide that the defendants acted within the scope of their authority under the facts of this case, on a motion to dismiss, was an error of law and in conflict with the settled rule of the cases decided in this Court.

The defendants' motion below addressed to the second cause of action was under Rule 12(b)(6), that the com-

plaint failed to state a claim upon which relief can be granted. Each defendant offered an affidavit to show that they were Federal employees. Such affidavits stated no more than the conclusion that what they did, they did as employees of the government. The affidavits did not state for example the scope of their duties. They did not state any of the facts of this case and what part each of the defendants played in them. They did not reveal the circumstances, from their point of view, leading to the cancellation of the contract. They did not state facts contradicting the allegations of the complaint.

On the other hand, the complaint stated that defendants had acted in their own personal interest to gratify their own desires to harm and injure petitioner by maliciously and unlawfully causing petitioner's contract to be cancelled. It is alleged that defendants applied to their superiors in Washington for authority to cancel and in doing so that they falsely stated the facts of petitioner's performance of the contract. From this, there should be inferred that they themselves did not have the authority to cancel the contract. Neither defendant claims that they had the duty to report petitioner. They do not claim that petitioner was in default and that they had the duty to report that fact to Washingon. Neither defendant claims that it was their duty to determine whether or not to cancel the contract. As stated above, the only statement of fact in their affidavit is that they were employees of the government. Their point was that as government employees, they were absolutely immuned from suit.

Plaintiff offered a limited affidavit in explanation of the allegations of the complaint, emphasizing that the complaint charged the defendant with personal activity, a pursuit of the petitioner, wilfully, to cause it injury and harm.

From this, it must be obvious that whether defendants were acting in their own interest as alleged by the plain-

tiff or were acting in the interest of their employer as inferred by the Courts below, that an issue of fact arose which could not be decided on affidavits. This has been held to be so by this Court.

Fountain v. *Filson* (1949), 336 U. S. 681;
Elgin, J. & E. R. Co. v. *Burley*, 325 U. S. 711, 743-749.

It is obvious that whether or not defendants acted within or without the scope of their authority, is a most material fact in this case. Hence, overlooking the existence of a genuine issue of fact in this important aspect of the case, the courts below erred to the great detriment of the petitioner's rights.

A subsidiary question presents itself in this connection. May the Court of Appeals transform a motion to dismiss into a motion for summary judgment?

Barron & Holtzoff, Federal Practice and Procedure, says that the transformation could be made at the discretion of the District Court.

Vol. 1, p. 669;
Vol. 3, p. 107.

This would appear to be the correct view because the Court of Appeals is limited to a review of the record so that if the District Court treats of a motion to dismiss as just that, then it has disregarded the affidavits and has acted upon the allegations of the complaint. In the case at bar, there were no "voluminous" affidavits submitted to the District Court as is spoken of by the Court of Appeals. The statement of facts that appear in the decision of the Court of Appeals are probably taken from the brief of the defendants filed in opposing the appeal. Such facts are not to be found in any of the affidavits. The affidavits of the defendants as used in the District Court are printed in full in the appendix hereto.

The District Court in its decision clearly states that it was deciding the motion to dismiss. Thereafter, the United States attorney submitted an order for signature which purported to grant summary judgment. This was an overreaching upon the scope of the decision. This had been pointed out to the Court of Appeals on the argument. At the same time, petitioner offered an affidavit of fact, but, permission to file such affidavit was denied. The court said that it could not accept affidavits of facts which were not before the District Court. It was pointed out that some of the facts were discovered subsequent to the decision of the District Court. This did not make any difference. The affidavit was refused. The court then volunteered to say that petitioner's position would be stronger if the Court were to infer all the intendments possible under the pleadings, as they had a right to do under a motion to dismiss. However, in its decision, the Court went on to treat the matter as a motion for summary judgment, and even goes on to state that "voluminous" affidavits were before the Court. Not only were such "voluminous" affidavits not before the District Court, but such a "fuller" affidavit or what petitioner was offering as a "fuller" affidavit was rejected by the Court of Appeals.

Consequently, it is believed that it would serve the interest of substantial justice for this Court to review these questions of practice.

WHEREFORE, petitioner respectfully prays this Honorable Court for a writ of certiorari to the Court of Appeals, Second Circuit to bring this matter up for review.

Respectfully submitted,

ANTHONY B. CATALDO,
Attorney for Petitioner.

APPENDIX

Decision and Opinion of United States Court of Appeals in the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 70—September Term, 1961.

(Argued November 9, 1961 Decided February 5, 1962.)

Docket No. 26814

OVE GUSTAVSSON CONTRACTING CO. INC.,

Plaintiff-Appellant,

—against—

FRANKLIN G. FLOETL, as Administrator of General Services Administration, MICHAEL BRENNAN, individually and as Contracting Officer of General Services Administration, and WILLIAM A. BOYD,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge,*
MEDINA and WATERMAN, *Circuit Judges.*

Appeal from an order and summary judgment of the United States District Court for the Eastern District of New York, Joseph C. Zavatt, *Judge.*

Plaintiff appeals from an order denying its motion to sever the action and remand to the New York Supreme Court, Queens County, the second claim for relief stated in the complaint, and from summary judgment for defendants on such second claim for relief. Opinion below reported at 187 F. Supp. 839. Affirmed.

Decision and Opinion of United States Court of Appeals in the Second Circuit.

ANTHONY B. CATALDO, New York, N. Y., *for plaintiff-appellant.*

ANN B. MIELE, Assistant United States Attorney, Brooklyn, New York (Joseph P. Hoey, United States Attorney, Eastern District of New York, Brooklyn, New York, on the brief), *for defendants-appellees.*

MEDINA, *Circuit Judge*:

Plaintiff, Ove Gustavsson Co. Inc., a New York corporation, appeals from an order and summary judgment in an action against certain officials of the federal Government, in their individual capacity, for damages caused by the alleged wilful and malicious acts of these officials in filing allegedly false reports concerning Gustavsson's performance of a Government construction contract, as a result of which reports the contract was cancelled. While the complaint was dismissed in its entirety, the appeal brings up for review only the summary judgment for defendants on the second claim for relief set forth in the complaint. Gustavsson also appeals from the order, made simultaneously with the granting of the summary judgment, denying Gustavsson's motion to sever the action and remand the second claim for relief to the New York Supreme Court, Queens County, where the action was commenced and from which it was removed to the United States District Court for the Eastern District of New York, pursuant to the provisions of 28 U. S. C. Section 1442(a)(1). The opinion of Judge Zavatt is reported at 187 F. Supp. 839. We affirm.

The United States needed a dehumidification hutment at Burlington, New Jersey, for the protection and storage of precision machinery, and on May 28, 1958 Gustavsson entered into a contract with the Government for the con-

struction of the required hutment. A hutment is an enclosed area in a warehouse built by joining panels of sheet metal together, and the one contracted for was to be equipped with dehumidification units. The contracting agency for the Government was the General Services Administration; defendant Brennan was the Contracting Officer and defendant Boyd was his Assistant. Floete, a defendant in the first claim for relief only, was Administrator of the General Services Administration. The original completion date was October 2, 1958, ninety days after Gustavsson received notice to proceed. Although some equipment had arrived at the job site by October 2, the work was far from completion and the contracting office of the General Services Administration had granted Gustavsson an extension. While the cause of further delay is a matter of dispute between the parties, it is clear that even as late as January 12, 1959, Gustavsson had failed to complete the construction work called for by the terms of the contract.

The contract contained the general provisions of a standard Government construction contract, and it included the following clauses:

> "If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work of such part of the work as to which there has been delay."
>
> "If the Contractor fails to proceed at once with the replacement of rejected material and/or the correction of defective workmanship the Government may terminate the right of the Contractor to proceed . . ."

Boyd, after investigating the facts and communicating with the contractor, recommended to his superior, Brennan, that the contract be terminated because of plaintiff's unsatisfactory performance. Brennan agreed, and a report was sent to the Washington office of the General Services Administration. The Washington office approved the report, authorized the termination, and on January 12, 1959 Gustavsson was notified that the contract had been terminated.

On February 6, 1959 Gustavsson appealed the termination to the Administrator of the General Services Administration in accordance with the "disputes" clause of the contract, and this appeal is still pending. Gustavsson also commenced an action in the United States District Court for the Southern District of New York against Franklin G. Floete, Administrator of General Services Administration, Michael Brennan, Contracting Officer, and William A. Boyd, Assistant Contracting Officer, in their official capacities. The relief prayed for in this first action was for an injunction, restraining defendants from awarding the contract to another contractor to complete the work on the as yet useless hutment, to review the decision terminating Gustavsson's contract, and for damages. This action was dismissed for lack of jurisdiction. *Ove Gustavsson Contracting Co. Inc.* v. *Floete*, S. D. N. Y., 1959, 176 F. Supp. 544, aff'd. 2 Cir., 1960, 278 F. 2d 912, cert. denied, 364 U. S. 894.

On June 26, 1959, while his appeal in the first action was still pending, Gustavsson commenced a second action, the subject of this appeal, in the New York State Supreme Court, Queens County. This second action was removed to the United States District Court for the Eastern District of New York, pursuant to 28 U. S. C. Section 1442(a)(1), and Gustavsson's motion to remand was denied, 176 F. Supp. 841. The complaint alleged two claims for relief.

The first, against the defendants Floete and Brennan "in their representative capacities," was dismissed because the same plaintiff was seeking the same relief against the same defendants in the then still pending Southern District action. As Gustavsson no longer contests the propriety of the dismisssal of the first claim for relief in the second action, it need concern us no longer.

The gist of the second claim for relief in the second action, asserted against defendants Brennan and Boyd "individually," is that said defendants, with intent to harm and injure the plaintiff, knowingly, intentionally, willfully, and maliciously made untrut ful reports concerning the performance of the contract by Gustavsson, and by reason of such untruthful reports caused the contract to be cancelled. Defendants' motion to dismiss the complaint pursuant to Federal Rule 12(b) was granted also as to this second claim for relief in the second action, the District Judge very properly treating the motion as one for summary judgment, as voluminous affidavits were submitted and considered in support of and in opposition to the motion. At the same time the District Court denied Gustavsson's cross-motion to sever the claims and to remand the second claim for relief, which the court treated as a motion for reconsideration of its prior order denying the original motion to remand the case. The opinion below is published at 187 F. Supp. 839.

The court below properly held defendants were entitled to summary judgment, because officials of the federal Government are not personally liable for alleged torts based upon acts done within the scope of their duties, which necessarily involved the exercise of a judgment or discretion which public policy requires be made without fear of personal liability. See, e.g., *Barr* v. *Matteo*, 1959, 360 U. S. 564; *Howard* v. *Lyons*, 1959, 360 U. S. 593; *Spalding* v. *Vilas*, 1896, 161 U. S. 483; *Gregoire* v. *Biddle*, 2 Cir., 1949,

177 F. 2d 579. The reason for this rule was stated in his own persuasive and inimitable fashion by Judge Learned Hand in *Gregoire* v. *Biddle*, *supra*, at page 581:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials; the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

The applicability of this rule to the circumstances of this case is obvious. Except for "the most resolute, or the

most irresponsible," a Governmental official whose duty it is to inspect the performance of Government contracts would indeed find it difficult honestly and independently to pass upon such work if he knew that an unfavorable report, coupled with an allegation of falseness and malice, could subject him to the risk, the inconvenience and the embarrassment of a public trial and to possible personal liability, as a result of which he might lose his home, his automobile, his savings and whatever other property, real or personal, he might possess. Furthermore, it cannot be said that the allegedly injured party is wholly without remedy. The appeal to the administrative agency itself, when not delayed by the possible effect of an attempt to litigate the same issues in court, is a far from perfunctory affair; and, in the event the cancellation order is sustained, the Administrative Procedure Act offers relief by way of a limited court review. Suit against the Government may lie in the Court of Claims. 28 U. S. C. Section 1491. Nor is it to be assumed that the executive branch of the Government will condone or overlook such acts of dishonesty and malice by officials charged with the performance of such duties as those exercised by the defendants.

Moreover, we see no reason to doubt that the reasons of policy described by Judge Learned Hand in *Gregoire v. Biddle, supra*, afford protection to federal officials of less than exalted or even less than high rank in the hierarchy of officialdom, as it is not impropable that officials such as these defendants might well feel the pressure of possible lawsuits and personal liabilities quite as much as would those officials who are more in the public eye and whose duties might be deemed more onerous or more important to the public welfare. Such comparisons are odious and unprofitable. The basic reason for the rule remains the same; and a sound policy would seem to place on level ground all

official duties involving the exercise of judgment and discretion.

Gustavsson urges upon us numerous reasons for holding that the rule of *Gregoire* v. *Biddle, supra,* is not applicable to the facts of this case as alleged. We find no merit in any of them. We assume, *arguendo,* as we must, that, as claimed, the defendants acted "with intent to harm and injure the plaintiff, knowingly, intentionally and wilfully." It is clear and uncontested, however, that reports on the performance of Government contracts are made in the course of defendants' jobs, and it necessarily follows that the reports complained of, which were reports of this character, were made within the scope of their official duties. Gustavsson asserts that this is not so, because the Government had not and could not authorize such tortious behavior, and defendants "did not have the authority to act to injure and damage" a person contracting to do construction work for the Government. The result of this proposed distinction would be that the immunity doctrine would be applicable only when plaintiffs fail to allege tortious conduct. As this Court held in *Gregoire* v. *Biddle, supra,* at page 581, such a limitation would defeat the whole doctrine, "what is mean by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him." See *Barr* v. *Matteo,* 1959, 360 U. S. 564.

Gustavsson asserts that the doctrine is applicable only to Government officials who must exercise "discretion," as opposed to those whose functions are "ministerial," and that defendants' functions are "ministerial." There is no litmus paper test to distinguish acts of discretion, compare *Dalehite* v. *United States,* 1953, 346 U. S. 15, with *Hatahley* v. *United States,* 1956, 351 U .S. 173; see 2 Harper & James,

Torts, § 29.14 at 1658 (1956), and to require a finding of "discretion" would merely postpone, for one step in the process of reasoning, the determination of the real question —is the act complained of the result of a judgment or decision which it is necessary that the Government official be free to make without fear or threat of vexatious or fictitious suits and alleged personal liability? Those responsible for inspecting and reporting on the performance of Government contracts must act with such freedom. It is much more than a mere possibility that many would be unable freely and honestly to perform their duties if they knew they might be subjected to the risk of trial and personal liability based on an unfavorable report which the ousted contractor might find it easy to claim was "false," and hence "malicious."

With respect to the argument that "where the Government steps down • • • to the market place, it cannot invoke its governmental privileges and it follows that its employees in the market place are not entitled to • • • immunity," it does not "follow," and besides Gustavsson's premise is not correct, see Hart & Wechsler, *The Federal Courts and the Federal System* 109 n. 1 (1953); compare 2 Harper & James, *Torts* § 29.6 (1956). Furthermore, even if a line could be drawn between the Government's "governmental" and "commercial" activities, the policy of the immunity doctrine is applicable to both, and, we are far from convinced that contracting for construction of the hutment in this case was not a governmental function.

There is no merit whatever in Gustavsson's contention that, since the contract was cancelled without a hearing before "the Assistant Commissioner," who apparently authorized the termination, he was deprived of property without due process of law.

There remains to be considered those exceptional cases in which Government officials were said to be subject to

suit for their torts. *Philadelphia Company* v. *Stimson*, 1912, 223 U. S. 605, 619-20; *Scranton* v. *Wheeler*, 1900, 179 U. S. 141, 152; *Belknap* v. *Schild*, 1896, 161 U. S. 10, 18; *United States* v. *Lee*, 1882, 106 U. S. 196, 200-21; *Little* v. *Barreme*, 1804, 2 Cranch 170; cf. *Tindal* v. *Wesley*, 1897, 167 U. S. 204 (state officials). This exception appears to have encompassed only situations in which either the official exceeded his authority or it was not validly conferred, *Yearsley* v. *W. A. Ross Construction Co.*, 1940, 309 U. S. 18, 21; *Banco De Espana* v. *Federal Reserve Bank*, 2 Cir., 1940, 114 F. 2d 438, and, therefore, is inapplicable to Gustavsson's claim. Even if the exceptional case required merely "a specific res held in the guise of public authority, but claimed by the plaintiff on the basis of a title superior to that of the sovereign * * * [and] a plaintiff may obtain his own property, real or personal, even from the agents of the sovereign itself," *Banco De Espana* v. *Federal Reserve Bank*, *supra*, at page 447, it remains consistent with the policy behind the immunity doctrine since the official defendant does not face the risk of personal liability. And, assuming *arguendo*, that, as Gustavsson asserts, its contract right was a "property right," its claim would not come within this exception since no tangible property is involved and personal liability is the sole aim and goal of this lawsuit.

Sound public policy, and established law, require that the summary judgment dismissing Gustavsson's second claim for relief in this action be affirmed.

The acts complained of clearly were performed under "color of office," 28 U. S. C. Section 1442(a)(1), and, therefore, the refusal to remand was not error

Affirmed.

WATERMAN, *Circuit Judge* (concurring in the result):

I concur in the result reached by my colleagues. I do so because the plaintiff's allegations of wrongdoing demonstrate that the alleged tortious acts of these particular defendants not only occurred in the necessary course of their obviously important official duties as contracting officers of the General Services Administration but were acts required of them if they were conscientiously to perform those duties.

I do not fully join in the majority opinion, however, for in these days of greatly expanded governmental commercial activity and increased governmental payrolls, I question the wisdom of flatly holding that the law grants immunity from personal tort liability to all governmental employees performing official duties that can be represented by the actors to be duties involving the exercise of judgment and discretion. This I understand to be the rationale of the majority opinion.

All jobs, even the most routine government ones, require the jobholder to exercise some degree of judgment and discretion on the job. A rational doctrine originally evolved to protect high-ranking policy-making administrative officers of our Government should not be extended to cloak with immunity all government employees.

Decision on Petition for Rehearing.

UNITED STATE COURT OF APPEALS

FOR THE SECOND CIRCUIT

OVE GUSTAVSSON CONTRACTING CO., INC.,

Plaintiff-Appellant,

v.

FRANKLIN G. FLOETE, as Administrator of General Services Administration, MICHAEL BRENNAN, individually, and as Contracting Officer of General Services Administration, and WILLIAM A. BOYD,

Defendants-Appellees.

PETITION FOR REHEARING

Anthony B. Cataldo, New York, N. Y., for plaintiff-appellant.

Petition for rehearing denied.

J. E. L.
S. R. W.
U.S.C.J.J.

13 Mar 1962

Decision on Petition for Rehearing *in Banc*.

UNITED STATE COURT OF APPEALS

FOR THE SECOND CIRCUIT

OVE GUSTAVSSON CONTRACTING CO., INC.,

Plaintiff-Appellant,

v.

FRANKLIN G. FLOETE, as Administrator of General Services Administration, MICHAEL BRENNAN, individually, and as Contracting Officer of General Services Administration, and WILLIAM A. BOYD,

Defendants-Appellees.

PETITION FOR REHEARING IN BANC

Anthony B. Cataldo, New York, N. Y.,
for plaintiff-appellant.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

13 Mar 1962

June 11, 1962

Judgment of Affirmance.

UNITED STATES COURT OF APPEALS.
FOR THE SECOND CIRCUIT.

At a stated term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifth day of February, one thousand nine hundred and sixty-two.

Present: HON. J. EDWARD LUMBARD, Chief Judge,
HON. HAROLD R. MEDINA,
HON. STERRY R. WATERMAN,
Circuit Judges.

OVE GUSTAVSSON CONTRACTING COMPANY, INC.,
Plaintiff-Appellant,

v.

FRANKLIN G. FLOETE, as Administrator of General Services Administration, MICHAEL BRENNAN, individually, and as Contracting Officer of General Services Administration, and WILLIAM A. BOYD,
Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by Counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order and judgment of said District Court be and it is hereby affirmed.

A. DANIEL FUSARO,
Clerk.

(SEAL) Filed in Clerk's office, U. S. District Court, Eastern District of New York, March 14, 1962.

Affidavit of Michael Brennan, in Support of Motion to Dismiss Complaint.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE]

Michael Brennan, being duly sworn, deposes and says:

1. I reside at 44 Morningside Drive, Borough of Manhattan, City, County and State of New York.

2. I am the Chief, Design and Construction Division, Region 2, Public Buildings Service, General Services Administration, one of the defendants named herein, and was the Contracting Officer for Contract No. GS-02B-6377 made on or about May 28, 1958 with the Plaintiff herein.

3 I am acquainted with the Plaintiff and am familiar with all issues involved in the subject litigation.

4. By letter dated January 12, 1959, I, as Contracting Officer for General Services Administration, notified Plaintiff that his right to proceed under the above mentioned contract was terminated.

5. That such termination took place after investigation of facts and circumstances surrounding Plaintiff's unsatisfactory performance under the contract; that my decision to terminate was made after a report of all the facts to our Washington Office and that such decision was approved and concurred in and authorized by said office.

6. On or about February 6, 1959, Plaintiff herein duly appealed my decision contained in my letter of January

12, 1959 terminating his right to proceed under the contract. This appeal is still pending with the Administrator of General Services, and no final action has yet been taken thereon by either the Administrator or by any appropriate Appellate Board within General Services Administration duly authorized to hear and determine said appeal; that final action on said appeal was deferred because the administrative files on the contract in question were in the possession of the United States Attorneys for the Southern and Eastern Districts of New York for use in connection with the various litigation brought by the plaintiff, but that I am advised that said administrative appeal will now receive the early attention of the Board of Review of this Agency.

7. That all action taken by me in connection with said contract was performed as part of my official duties and in the normal course thereof and in accordance with appropriate authority delegated to me as Chief, Design and Construction Division and Contracting Officer of said contract.

(Sworn to by Michael Brennan, September 18, 1959.)

Affidavit of William A. Boyd, Read in Support of Motion to Dismiss Complaint.

UNITED STATES DISTRICT COURT,

EASTERN DISTRICT OF NEW YORK.

[SAME TITLE]

WILLIAM A. BOYD, being duly sworn, deposes and says:

1. I reside at 52 Rossmore Place, Belleville, New Jersey.

2. I am the Assistant Chief, Design and Construction Division, Region 2, Public Buildings Service, General Services Administration, and one of the defendants named herein.

3. I was assigned by my superior, Michael Brennan, to look into the causes for the delinquent status of Contract No. GS-02B-6377 made on or about May 28, 1958 with the Plaintiff herein and to report to Mr. Brennan the facts and circumstances concerning the performance of said contract.

4. After investigating the facts and communicating with the contractor and his subcontractors, I recommended to my superior, Mr. Brennan, that the rights to proceed under the contract be terminated by reason of the contractor's unsatisfactory performance thereunder.

5. All action taken by me in connection with said contract was done as part of my official duties and responsibilities, in the normal course of my duties, in accordance with appropriate authority heretofore delegated to me and with the full knowledge and consent of and at the direction of my superiors.

(Sworn to by William A. Boyd, September 18, 1959.)